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No. 79-1263

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM E. JAHODA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for filing a false income tax return on the ground that there was an impermissible amendment of the indictment or, in the alternative, on the ground that there was a prejudicial variance between the indictment and the proof.

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully making and subscribing a false income tax return for 1973, in violation of 26 U.S.C. 7206(1). The district court sentenced petitioner to two years' imprisonment, and the court of appeals affirmed (Pet. App. 1-2).

The indictment charged (Pet. App. 4-5) that petitioner signed, under penalties of perjury, a tax return for the 1973 calendar year that he did not believe was "true and accurate as to every material matter, in that said return reported income from wages, interest and rental property," when, in fact, petitioner "knew and believed * * * he had substantial income in addition to that" reported on his return and "knew and believed that he operated a gambling business and failed to disclose on [his] return the gross wages received, expenses incurred or other information relative to this business."

Petitioner's 1973 tax return reported income in the amount of $13,040 from wages, interest income, and rental income (Govt. Ex. 1). The evidence at trial established, however, that petitioner had won more than $100,000 in various games of chance in which he participated during 1973. Petitioner does not contest the lower court's findings that he willfully made and subscribed a tax return that substantially understated his income for 1973. Rather, he points out that the indictment alleged that he failed to disclose on his tax return gross wages received from a gambling business and that the proof at trial established that he failed to report gambling winnings. He contends that this difference between the proof and the indictment was an impermissible amendment of the charge in the indictment. Alternatively, he argues that there was a prejudicial variance between the indictment and the proof.

The decision below correctly held that there was no impermissible amendment of the indictment. There was no formal amendment of the indictment, and petitioner does not contend otherwise. Nor was there any constructive amendment of the indictment, which occurs only

when the proof at trial is of a different or additional crime than that alleged in the indictment. *United States* v. *Fruehauf Corp.*, 577 F. 2d 1038, 1055 (6th Cir.), cert. denied, 439 U.S. 953 (1978). The indictment here (Pet. App. 4-5) did not charge that petitioner's tax return was fraudulent because it falsified the source of his income.[1] Rather, it charged that petitioner's tax return was fraudulent because it falsified the amount of his income. The evidence presented by the government at trial proved that petitioner received substantial income beyond that which he reported on his 1973 tax return (Pet. App. 10), and thus established the crime charged in the indictment. That the source of the income was various "gambling activities" rather than a "gambling business" is irrelevant. It is only necessary to prove so much of an indictment as establishes, prima facie, that there has been a violation of the statute involved. *Gambill* v. *United States*, 276 F. 2d 180 (6th Cir. 1960).[2]

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[1] *United States* v. *DiVarco*, 484 F. 2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974), upon which petitioner relies (Pet. 11-12), is therefore distinguishable. In *DiVarco* it was charged that the tax returns at issue were fraudulent because they each falsely reported the source of the income.

Petitioner's reliance (Pet. 11) on *United States* v. *Carrillo*, 561 F. 2d 1125 (5th Cir. 1977), is also misplaced. *Carrillo* did not hold that the source of income is a material matter which must be proved. Instead, the court observed that where the government proves receipt of income, it necessarily proves, as a consequence, the source of that income (561 F. 2d at 1127).

[2] None of the cases relied upon by petitioner (Pet. 12-13) supports his claim that there was an impermissible amendment here. In *Ex parte Bain*, 121 U.S. 1 (1887), the trial court formally amended the indictment by striking language from it. *Russell* v. *United States*, 369 U.S. 749 (1962), involved a case where the indictment itself was invalid because it did not inform the defendant of the nature of the accusation against him. In *United States* v. *Prejean*, 494 F. 2d 495 (5th Cir. 1974), the defendant was convicted of a greater offense (burglary of a private residence at night) than that charged in the indictment (burglary).

At worst, there was merely a variance between the particulars alleged in the indictment and the proof. But a variance requires reversal only if it results in surprise that is prejudicial to the defendant's efforts to prepare his defense or otherwise affects his substantial rights. *United States* v. *Fruehauf Corp.*, *supra*, 577 F. 2d at 1057. Petitioner has never argued that he was unfairly surprised by the proof at trial, nor could he so contend. Prior to trial, petitioner stipulated to the disposition of checks given to him in payment of gambling losses (trial transcript 7; Stipulation IV), and he was therefore aware of the particulars of proof which the government intended to present at trial. Similarly, petitioner has not contended that any variance would preclude him from pleading the conviction in this case as a bar should the government ever seek in the future to prosecute him for filing a false tax return for the 1973 calendar year.

Contrary to petitioner's final argument (Pet. 14-15), the decision below does not conflict with either *Dunn* v. *United States*, 442 U.S. 100 (1979), or *Stirone* v. *United States*, 361 U.S. 212 (1960). *Dunn* simply held that the court of appeals erred in upholding a conviction on the basis of a charge that was neither alleged in the indictment nor presented to the jury at trial (see 442 U.S. at 106-107). In *Stirone* the indictment charged an interference with the importation of sand into Pennsylvania. There was proof at trial both of an interference with the importation of sand into Pennsylvania and of an interference with the exportation of steel out of Pennsylvania, and the jury was told that it could convict on either theory. Since interference with commerce was an essential element of the crime, proof as to interference with exportation constituted proof of a crime not charged in the indictment (361 U.S. at 218-219). Here, on the

other hand, petitioner was not charged with falsifying the source of his income, but rather with willfully understating the amount of his income in his tax return. The source of his income was therefore not an essential element of the crime charged.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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